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CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MICHELLE C., a Person Coming Under the Juvenile Court Law.	D044991
IMPERIAL COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. MARIA F., Defendant and Appellant.	(Imperial County Super. Ct. No. 19352)
In re MARIA F. on Habeas Corpus.	D045491

APPEAL from a judgment of the Superior Court of Imperial County and consolidated proceedings in habeas corpus, Juan Ulloa, Judge. Judgment reversed; petition denied as moot.

Linda M. Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Ralph Cordova, Jr., County Counsel, Gustavo A. Roman and Liza Barraza, Deputy County Counsel, for Plaintiff and Respondent.

Appellate Defenders, Inc. and Alice C. Shottin, under appointment by the Court of Appeal, for Minor.

I.

INTRODUCTION

In this consolidated appeal and petition for a writ of habeas corpus, Maria F. (Maria) challenges an order and judgment of the juvenile court terminating her parental rights to Michelle C. (Michelle) after a hearing pursuant to Welfare and Institutions Code[1] section 366.26. Maria maintains that the trial court violated her constitutional due process rights and her right to counsel by proceeding to terminate her parental rights despite the fact that neither she nor her attorney were present at the selection and implementation hearing. We conclude that the court violated Maria's constitutional rights by terminating her parental rights at a hearing at which neither she nor her attorney were present, in the absence of a waiver, express or implied, of her right to be represented by

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1 Subsequent statutory references are to the Welfare and Institutions Code unless otherwise noted.

counsel or to be heard, and that the error is a structural one that requires automatic reversal.

The process itself was so fundamentally flawed and unfair that a court could not perform a harmless error analysis even if it were so inclined, because the resulting record is so limited. Because neither Maria or her attorney were present at the section 366.26 hearing, the record contains nothing regarding Maria's position. Further, the court made no findings, either orally or in writing, to support its ultimate conclusion that "it is likely [Michelle] will be adopted."[2] This lack of findings is confirmation that the process here was entirely one sided and fundamentally unfair.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Michelle was born premature on October 12, 2002. She had a number of medical complications, and remained at Children's Hospital in San Diego from the time of her birth until her release on December 31, 2002.

On January 10, 2003, the Imperial County Department of Social Services (DSS) filed a section 300 petition alleging that Maria failed to obtain prenatal care while she was pregnant with Michelle and that she was not following through with proper medical care for Michelle after the birth. The petition also alleged that Maria told the social

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2 As Michelle's counsel acknowledges on appeal, "the evidence in the record is not complete enough to warrant a finding of adoptability," in part because Michelle has special needs that "do not make Michelle *generally* adoptable and nothing in her adoption assessment report attempts to characterize her as such." (Italics added.)

worker she had used drugs three months before the petition was filed, and that Michelle had tested positive for opiates at birth.

The court held a detention hearing on January 13, 2003, and ultimately ordered that Michelle be detained. Maria, who was represented by appointed counsel from the public defender's office,[3] was present at the hearing. The court set the matter for both pretrial and jurisdictional hearings.

After the jurisdictional hearing was continued a number of times, the county counsel moved to dismiss the petition without prejudice on April 10, 2003. The court granted the motion and the detention orders were vacated.

On April 14, 2003, DSS filed another section 300 petition alleging facts substantially similar to those alleged in the previous petition. The court held a detention hearing on April 15, 2003, and again ordered that Michelle be detained. Maria was not present at this hearing, but she was represented at the hearing by her attorney, William Roche. The court set the matter for a pretrial hearing and a jurisdictional hearing.

The alleged father, Ramiro C. (Ramiro), made his first appearance at a pretrial conference on July 8, 2003. The court appointed counsel to represent him.

On July 29, 2003, the jurisdictional report was filed. The report included a history of Michelle's medical problems and noted that Maria had resisted DSS's offers to provide

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3 Apparently, after the public defender's office declared a conflict, the court later appointed Attorney William Roche to represent Maria in subsequent proceedings.

her with services. According to the report, Maria had not availed herself of services offered by the hospital, such as transportation to Michelle's medical appointments and support group meetings, and she had not requested information about Michelle's condition. Maria continued to blame the hospital for Michelle's positive drug test results. The report also stated that Maria continued to refuse to submit to any drug testing, despite the fact that on three different occasions the court had ordered her to do so. The report also noted that Ramiro had not contacted DSS since his first appearance in the matter.

The jurisdictional hearing was held on August 19, 2003. Although Maria was not present, she was represented at the hearing by her attorney. Maria's attorney requested a continuance because Maria was not present. The court denied the request and sustained the petition. The matter was then set for a dispositional hearing.

A disposition report was filed on September 12, 2003. The report recommended that Maria receive family reunification services, including a parenting class and individual counseling. The report also suggested that Maria complete a drug rehabilitation program, submit to random drug testing, cooperate with the social worker, report changes of address, telephone or other living arrangements, complete an anger management program, and complete a medical training course, among other things. The dispositional hearing was held on September 22, 2003. Maria and her attorney were present. Ramiro was not present. The court ordered that Maria receive reunification services, but did not order services for Ramiro. The court scheduled a six-month review hearing pursuant to section 366.21, subdivision (e) for December 15, 2003.

The section 366.21, subdivision (e) hearing was held on January 13, 2004. Both Maria and her attorney were present at that hearing. The status review report, filed on December 17, 2003, stated that Michelle had been placed in a licensed foster home for medically fragile children. It recommended that Michelle not be returned to Maria and that reunification services be terminated because Maria had not completed a parenting class, had not participated in individual counseling, and had not participated in either an inpatient or outpatient drug rehabilitation program. The report also noted that Maria still had not submitted to a court-ordered drug test and that she had failed to complete an anger management course. The court found that Maria had made only minimal progress in her reunification plan and concluded that Michelle should not be returned to Maria. The court terminated Maria's family reunification services, and scheduled a selection and implementation hearing, pursuant to section 366.26, for May 10, 2004.

A section 366.26 report was filed on May 6, 2004. The report stated that Michelle was showing improvement, but that she continued to have medical problems and was possibly mildly developmentally delayed. The report noted that DSS had facilitated monthly visits between Michelle and Maria, and that Maria occasionally brought her son Anthony with her to the visits. According to the report, Michelle appeared extremely content and well adjusted with her foster parents and did not seem affected by Maria's absence. The report also discussed Maria's drug testing, noting that she had tested negative on a urine test and that the results of a hair follicle test were still pending at the time the report was written. The report recommended adoption as the permanent plan for

Michelle. Her foster parents had expressed an interest in adopting her and they had been providing a safe and stable home for her since January 2003.

On May 10, 2004, with both Maria and her attorney present, the section 366.26 hearing was continued to June 7. Maria and her attorney were again present on June 7, when the hearing was continued to August 9, at the request of DSS, so that the department could have the opportunity to serve Ramiro with notice of the hearing. Maria's attorney requested that visitation between Maria and Michelle continue, and the court granted the request.

Neither Maria nor her attorney appeared in court on August 9. Maria had informed the social worker prior to the hearing that she would not be able to attend the hearing because of a problem that had arisen over the weekend. The court stated on the record that someone from Attorney Roche's office had called to inform the court that Attorney Roche was in trial and, according to the court "ha[d] made no arrangement to have someone cover his calendar."

Attorney Roche's secretary had called a court clerk that morning to inform the court that Attorney Roche was involved in a trial that was taking longer than he had expected, and that he would appear in juvenile court as soon as the trial ended.[4] She also gave the clerk the telephone number of the department in which Attorney Roche's trial was taking place so that the court could contact him if necessary. The court clerk did not

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4 Attorney Roche is a solo practitioner and had not expected his trial to last as long as it did.

indicate to Attorney Roche's secretary that the court would proceed with the termination hearing without Attorney Roche. Attorney Roche expected that the court would trail the matter or continue it, as was the custom and practice he had encountered from courts when scheduling conflicts arose. The trial court did not contact Attorney Roche at his office or at the number he provided to the court to inform him that the matter would not be trailed.

Despite the fact that neither Maria nor her attorney were present, the court proceeded with the selection and implementation hearing. DSS submitted the matter after offering in evidence the section 366.26 report and the proofs of service of notice on the parents. Counsel for Michelle submitted without offering any evidence or testimony.

The court found that notice of the original section 366.26 hearing had been given as required by law and that notice of the continuance dates had also been provided. The court concluded that clear and convincing evidence established that Michelle was adoptable and that she was likely to be adopted. The court terminated both Maria's and Ramiro's parental rights. Through counsel, Maria filed a notice of appeal on August 26, 2004. On December 6, 2004, she filed a petition for a writ of habeas corpus in which she makes essentially the same arguments as she does in her appeal. The matters were consolidated in this court on June 8, 2005.

III.

DISCUSSION

A. *The trial court violated Maria's due process rights by proceeding with the selection and implementation hearing when neither Maria nor her attorney were present*

"[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." (*Santosky v. Kramer* (1982) 455 U.S. 745, 753 (*Santosky*).) In an action initiated by the state to terminate parental rights, the private interest at stake is a parent's "fundamental" and "commanding" liberty interest in maintaining a parent-child relationship with the child. (*Id*. at pp. 758-759.) It is "'plain beyond the need for multiple citation' that a natural parent's 'desire for and right to "the companionship, care, custody, and management of his or her children"' is an interest far more precious than any property right. [Citation.]" (*Ibid*.)

Impairment of this fundamental right requires strict adherence to procedural due process rights, focusing on the fairness of the proceedings. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412.) Determining what satisfies the requirements of due process is "an uncertain enterprise [in] which [courts] must discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." (*Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 24 (*Lassiter*).) In juvenile dependency proceedings, as in other proceedings that would deprive an individual of important rights, due process takes the form of the right to notice and an opportunity to be heard. (See *In re Matthew P.* (1999) 71 Cal.App.4th 841, 851.) Moreover, "the right to notice and an opportunity to be

heard 'must be granted at a meaningful time and in a meaningful manner.' [Citation.]" (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80.)

In order to ensure that the right to notice and the right to be heard are granted in a meaningful manner, "[s]ignificant safeguards have been built into the current dependency scheme." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) These safeguards include "representation by counsel to assist parents at every stage of the proceedings (§ 317), notice of all hearings and rights (§ 307.4, 308, 311, 316, 335-336, 364-366.23), clear and convincing evidence for removal from custody (§ 361, subd. (b)), reunification services (§ 361.5), and review hearings at which services and progress are reviewed (§ 366.21, 366.22)." (*In re Marilyn H., supra*, 5 Cal.4th at pp. 307-308.)

The manner in which the trial court terminated Maria's parental rights implicates due process concerns in two ways. First, the trial court deprived Maria of any assistance of counsel by proceeding with the selection and implementation hearing in the absence of her attorney, when Maria had not waived her right to be represented by counsel, either expressly or impliedly. More significantly, by proceeding with the hearing when neither Maria nor her attorney were present, the trial court deprived Maria of a fundamental due process right—the opportunity to be heard.

1. *The right to the effective assistance of counsel*

Although in California a parent's right to counsel in dependency proceedings generally derives from statute (§§ 317 and 317.5), a parent may also have a constitutional right to counsel at some stages of dependency proceedings. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1407 (*In re O.S.*), citing *Lassiter, supra*, 452 U.S. at pp. 31-34

[applying three elements given in *Mathews v. Eldridge* (1976) 424 U.S. 319, in deciding what due process requires in dependency proceedings].) To determine whether a parent has a constitutional right to counsel at any particular point during the dependency proceedings, courts evaluate and weigh the private interests at stake, the government's interest, and the risk that the procedures used will lead to an erroneous decision. (*Lassiter, supra*, 452 U.S. at pp. 31-34.)

"The appointment of counsel is a constitutional imperative only when, in the estimation of 'the court in which the matter is pending subject to appellate review,' fundamental fairness requires such appointment. [Citation.]" (*In re Meranda P*. (1997) 56 Cal.App.4th 1143, 1154, fn. 6.) In *Lassiter*, a plurality of the court determined that "the decision whether due process calls for the appointment of counsel of indigent parents in termination proceedings [is] to be answered in the first instance by the trial court, subject, of course, to appellate review." (*Lassiter, supra*, 452 U.S. at p. 32.)[5] Therefore, each court must independently evaluate the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions in each case, "balanc[ing] these elements against each other, and then set[ting] their net weight in the scales against the presumption" that there is a right to appointed counsel only when personal freedom is at stake. (*Id*. at p. 27.)

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5 The *Lassiter* court concluded, "'[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements'" because in each case, the "'facts and circumstances . . . are susceptible of almost infinite variation . . . .' [Citation.]" (*Lassiter, supra,* 452 U.S. at p. 32.)

The *Lassiter* court further determined that a trial or appellate court faced with deciding whether due process requires the appointment of counsel "need not ignore a parent's plain demonstration that she is not interested in attending a hearing." (*Lassiter, supra*, 452 U.S. at p. 27.) Because the mother in *Lassiter* had expressly declined to appear at a previous custody hearing, and "had not even bothered to speak to her retained lawyer after being notified of the termination hearing," the high court agreed with the trial court that she lacked any real interest in participating in the proceedings. (*Ibid.*) The Supreme Court concluded that in view of all of these circumstances, the trial court had not erred in failing to appoint counsel for Lassiter. (*Ibid*.)

Although the court in this case did appoint counsel to represent Maria, in our view, the *Lassiter* analysis of the due process issue applies since the purpose of appointing counsel in dependency proceedings is to ensure that the parent whose rights are at stake will be assisted by and represented by counsel throughout the dependency proceedings, thereby safeguarding the parent's right to be heard. Here, proceeding with the selection and implementation hearing in the absence of Maria's attorney had the same effect as if the court had failed to appoint counsel for her. We conclude that in this case, proceeding with the selection and implementation hearing in the absence of Maria's counsel contravened the requirements of section 317[6] *and* violated Maria's constitutional right to due process.

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6 Section 317 provides in relevant part: "(a) When it appears to the court that a parent . . . of the child desires counsel but is presently financially unable to afford and cannot for that reason employ counsel, the court may appoint counsel as provided in this

Maria demonstrated that she had a significant personal interest in maintaining a relationship with Michelle. Unlike the mother in *Lassiter* who had indicated no interest in participating in the dependency process, failed to inform her retained attorney about the termination hearing, and expressly requested not to be present at a prior proceeding, both Maria and her attorney were present at the section 366.21, subdivision (e) hearing and at the originally scheduled section 366.26 hearing on May 10, 2004. She and her attorney were also present at the first rescheduled section 366.26 hearing on June 7, 2004. It was at the behest of DSS—not Maria or her attorney—that the June 7 hearing was continued to August 9, the date on which the trial court terminated her parental rights. While the state may have an interest in resolving Michelle's status expeditiously, any interest the state has in resolving Michelle's status without delay is insignificant in comparison to Maria's compelling interests, particularly considering that the state agreed to the first continuance of the 366.26 hearing, and that it was the state that requested the second continuance.

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section. [¶] (b) When it appears to the court that a parent . . . of the child is presently financially unable to afford and cannot for that reason employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care, the court shall appoint counsel, unless the court finds that the parent . . . has made a knowing and intelligent waiver of counsel as provided in this section. [¶] (d) The counsel appointed by the court shall represent the parent, . . . at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent . . . unless relieved by the court upon the substitution of other counsel or for cause. The representation shall include representing the parent . . . in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship."

The court terminated Maria's parental rights at a hearing at which she was not represented at all, despite the fact that she had an appointed attorney who had been present at previous dependency proceedings. Holding a section 366.26 hearing in the absence of a parent's appointed attorney means that the proceeding may be completely one-sided. Any decision rendered under these circumstances is inherently unreliable; by hearing only one side's presentation of evidence, the outcome of the case is necessarily skewed. (Cf. *Salas v. Cortez* (1979) 24 Cal.3d 22, 31 [by "intervening heavily" on behalf of a mother in a paternity determination case, state has "skewed the outcome" and due process requires indigent defendant be appointed counsel].) Even if the case does not involve complex issues of law, the determination of what is best for the child can be an exceedingly difficult one that requires a process of balancing many complex and competing considerations that are unique in every case; in these circumstances, a parent who does not have the assistance of counsel will be at a decisive disadvantage, thus significantly increasing the risks of an erroneous result.[7]

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[7] The state shares an indigent parent's interest in ensuring that the dependency process is one in which an accurate and just result is achieved. "If as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interest may become unwholesomely unequal." (*Lassiter, supra*, 452 U.S. at p. 28.) A court's decision to terminate parental rights rather than order guardianship or long-term foster care where one of the exceptions listed in section 366.26 exists, or when "terminating parental rights is not in the interests of the minor" (§ 366.26, subd. (c)(4)), would be erroneous. Certainly the risk of such result is higher where the parent has had no meaningful opportunity to comment on the exceptions or the child's interests.

California courts have determined that an indigent parent's right to the assistance of counsel is more than the right to have an attorney assigned to one's case. It requires that the parent be *assisted* by counsel during court proceedings. When due process requires the appointment of counsel, the person represented is entitled to the *effective assistance* of counsel; "otherwise 'it will be a hollow right.' [Citations.]" (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1659.)[8] If he had been present, Maria's attorney could have assisted her by presenting her position regarding the possible termination of her parental rights. Unlike the situation in *Lassiter*, in which the mother was in court and able to present her position, for Maria, the assistance of her attorney would have been significant because there was no one else at the hearing who could present Maria's position. (See *Lassiter, supra*, 452 U.S. at p. 33.) Certainly, at a minimum, terminating parental rights at a hearing at which the parent's attorney is not present, when that parent has an attorney and has not waived the right to be represented by counsel at the hearing, either expressly or impliedly, constitutes a deprivation of the effective assistance of counsel.

Here, the parental rights at issue are considered to be "fundamental" and "commanding" (*Santosky, supra*, 455 U.S. at pp. 758-759), and the proceeding could have resulted, and in fact did result, in the complete termination of these fundamental rights. We conclude that under the circumstances in this case, the court deprived Maria

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8 An indigent parent also has a statutory right to the effective assistance of counsel. (§ 317.5.)

of her right to the assistance of counsel at the section 366.26 hearing as derived both from statutes (§§ 317 and 366.26, subds. (f)(1) and (f)(2)) and the Constitution (see *In re O.S., supra*, 102 Cal.App.4th at p. 1407; see also *In re Kristin H., supra*, 46 Cal.App.4th at p. 1659).

2. *The right to a meaningful hearing and the opportunity to be heard*

What makes the circumstances of this case unique is that in going forward with the section 366.26 hearing in the absence of both Maria and her attorney, the court deprived Maria of *any* meaningful opportunity to be heard in the matter, and thus denied her both her constitutional and statutory rights to due process of law.[9] Fundamental fairness requires that a mother who may lose all rights to parent her child be given notice and a meaningful opportunity to be heard before a court terminates her parental rights. This is why, in the context of child dependency litigation, evaluations of due process requirements focus on the right to a hearing and the right to be notified of the hearing. (See, e.g., *In re B. G.* (1974) 11 Cal.3d 679, 689 [failure to give mother notice of hearing was a deprivation of due process].) "A hearing denotes an opportunity to be heard and to adduce testimony from witnesses. Moreover, parties in civil proceedings have a due

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9 The dissent maintains that "a parent's rights at the section 366.26 hearing are significantly diminished compared to the fundamental parental rights at stake during the dispositional process." (Dis. opn., *post*, p. 3.) However, at issue at the 366.26 hearing is whether or not adoption will be ordered or rather, another disposition, based on a statutory exception to adoption. Only adoption entails the termination of parental rights. Therefore, the parent continues to have a strong interest in the fundamental right to "maintain the parent-child bond" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419), even after the right to reunification services has ended.

process right to cross-examine and confront witnesses. [Citation.]" (*In re James Q*. (2000) 81 Cal.App.4th 255, 263.) Thus it has been held that the failure to provide parents with a copy of the social worker's report, upon which the court will rely in coming to a decision, constitutes a denial of due process. (*In re George G*. (1977) 68 Cal.App.3d 146, 156-157; see also *In re Jeanette V*. (1998) 68 Cal.App.4th 811, 816-817.)

Although the ultimate goal in dependency cases is to do what is best for the child, dependency proceedings are, nevertheless, fundamentally "'adversarial in nature.' [Citation.]" (*In re Kristin H., supra*, 46 Cal.App.4th at p. 1662; cf. *In re Charles T.* (2002) 102 Cal.App.4th 869, 875 ["[P]roceedings, particularly when termination of parental rights may result, are accusatory in nature as to the parent"].) In these proceedings, "[t]he governmental agency is represented by its own counsel and employs professional social workers who are empowered to investigate the family situation and to testify against the parent. Moreover, the possible end result of the process, namely the total and irrevocable severance of the parent-child relationship, has been acknowledged as a punitive sanction." (*In re Kristen H., supra*, 46 Cal.App.4th at p. 1662.) The adversary system "presupposes" that "accurate and just results are most likely to be obtained through the *equal* contest of opposed interests." (*Lassiter, supra*, 452 U.S. at p. 28, italics added.) In this case, proceeding without either Maria's attorney or Maria herself being present deprived Maria of any opportunity to participate in the termination hearing. We conclude that the juvenile court's failure to postpone the hearing until Maria and/or her attorney could be present resulted in a miscarriage of justice and constituted a violation of Maria's due process rights.

B. *The error requires reversal*

DSS concedes that the trial court "may have erred in proceeding with the §366.26 hearing in Maria & [*sic*] her counsel's absence . . . ." However, DSS contends that the court's error was harmless because there was substantial evidence to support the court's order terminating parental rights under a standard of either proof a beyond a reasonable doubt or clear and convincing evidence. We conclude that the trial court's error was of such magnitude that the error requires automatic reversal.

Where, as here, the fundamental constitutional right to parent has been impaired as a result of the court's error, we join other California courts in taking guidance from the analysis provided in *Arizona v. Fulminante* (1991) 499 U.S. 279 (*Fulminante*).[10] The *Fulminante* court recognized that, as a general rule, constitutional error does not automatically require reversal, and that in determining the effect of "most constitutional errors," appellate courts may properly apply a *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) harmless error analysis. (*Fulminante, supra*, 499 U.S. at p. 306.) According to the Supreme Court, the "common thread" connecting cases in which courts have applied the *Chapman* harmless error analysis "is that each involved 'trial error'─error

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10 (See, e.g., *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 554 ["Although *Arizona v. Fulminante*, *supra*, 499 U.S. 279, analyzed the consequence of an error implicating the constitutional rights of a *criminal* defendant, California courts have frequently relied upon such United States Supreme Court analysis in analogous situations in which the fundamental constitutional right to parent is the subject of some error"].) "Although parents in dependency proceedings are not prosecuted as defendants, petitions often contain allegations of criminal activity," and dependency proceedings are "'adversarial in nature.' [Citation.]" (*In re Kristin H., supra,* 46 Cal.App.4th at p. 1662 [concluding termination of parental right is a "punitive sanction"].)

which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." (*Fulminante, supra*, 499 U.S. at p. 307.) The *Fulminante* court explained that the harmless error doctrine is "essential to preserve the 'principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.' [Citation.]" (*Id*. at p. 308.)

In contrast, "structural" errors involve "'basic protections, [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.' [Citation.]" (*Fulminante, supra*, 499 U.S. at p. 310.) A structural error requires reversal *without regard to the strength of the evidence or other circumstances*. (*Ibid*.) Examples of structural errors in the criminal context include the total deprivation of the right to counsel at trial, a biased judge, unlawful exclusion of members of the defendant's race from a grand jury, denial of the right to self-representation at trial, denial of the right to a public trial, and an erroneous reasonable doubt instruction to the jury. (*Id*. at pp. 309-310.)

Through circumstances beyond her control, and without her knowledge, Maria's attorney failed to appear for the selection and implementation hearing.[11] By proceeding with the section 366.26 hearing when neither Maria nor her attorney were present, the trial court effectively deprived her of her right to counsel, and also deprived her of *any* opportunity, let alone a meaningful opportunity, to be heard. (Cf. *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1116 [failure to "attempt to give a parent statutorily required notice" of a termination hearing is a structural defect requiring automatic reversal because it deprived the parent of a meaningful opportunity to be heard] (*Jasmine*); *Judith P. v. Superior Court, supra*, 102 Cal.App.4th at pp. 557-558 [in context of § 366.21 hearing, it was "fundamentally unfair" to terminate a parent's or child's familial relationship when the parent and/or child was not given an adequate opportunity to prepare and present the best possible case for continuation of reunification services and/or reunification].) By depriving Maria of a meaningful opportunity to be heard, the trial court eliminated a basic protection necessary to ensure the reliability and legitimacy of termination proceedings.

DSS urges us to apply a harmless error test and affirm the trial court's judgment. There is little guidance available for how to review an error such as the one here, as we are aware of no cases in which a court has proceeded to terminate parental rights in the

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11 We disagree with the dissent that it is unreasonable for a party who is represented by counsel to rely on counsel to represent his or her interests in the party's absence. A party who believes counsel will adequately represent his or her interests should not be impugned as having no interest in the proceedings, particularly in the absence of other evidence in the record establishing a lack of interest. (Dis. opn., *post*, pp. 5-6.)

absence of the parent or her attorney, when that parent is represented by counsel and has neither expressly nor impliedly waived the right to be represented by counsel, or the right to be heard. We have found two cases in which other appellate courts have applied a harmless error analysis to errors that effectively resulted in one-sided termination proceedings. (See *In re Angela C.* (2002) 99 Cal.App.4th 389 (*Angela C.*); *In re Malcolm D.* (1996) 42 Cal.App.4th 904 (*Malcolm D.*).) However, for a number of reasons, we find these cases distinguishable from the present case and we think it inappropriate to apply a harmless error standard to the situation before us.

Angela C. dealt with a mother's claim of lack of notice pertaining to a continued section 366.26 hearing. Angela's mother had received personal notice of the original termination hearing date, but failed to appear on that day. (*Angela C., supra*, 99 Cal.App.4th at p. 392.) Because the agency was concerned that the father had not been adequately served, the court continued the termination hearing to another date. The record on appeal was silent as to whether or not the mother had been provided notice of the continued hearing date, and she did not attend the hearing. The trial court proceeded to terminate her parental rights. (*Ibid.*)

On appeal, the mother challenged the trial court's order, arguing that she had never received proper notice that the section 366.26 hearing had been continued to a different date. Although the Court of Appeal agreed with the mother that the trial court had erred in finding that she had received proper notice and in terminating her parental rights, the court concluded that the "harmless beyond a reasonable doubt" standard enunciated in *Chapman, supra*, 386 U.S. 18 should be applied to the error because, in the court's words,

"the lack of notice of a continuance is in the nature of a trial error." (*Angela C., supra*, 99 Cal.App.4th at p. 395.) The court reasoned that the error was not structural because the mother "has had notice of these dependency proceedings from the outset, as well as the opportunity to be heard." (*Ibid*.) According to the court, "had the [trial] court proceeded on the originally scheduled hearing date, as it had every right to do with respect to appellant, that hearing too would have been uncontested in that appellant failed to attend the hearing as originally noticed or notify anyone as to her position." (*Ibid*.) For this reason, the court determined that the error was harmless beyond a reasonable doubt.

Significantly, the *Angela C.* court did not address the issue of the right to counsel.[12] Rather, the opinion deals only with the question whether the lack of notice of a continuance should be reviewed for prejudice, or instead, is reversible per se. Further, unlike the situation here, the mother in *Angela C.* failed to appear on the date originally set for the selection and implementation hearing, an act that could be construed as an implied waiver of the right to be heard (and, by extension, the right to be represented by counsel) at that hearing.[13] In contrast, Maria was represented by counsel throughout the dependency proceedings, and she was clearly contesting termination of her parental rights. Her attorney had informed the court of his scheduling conflict, as well as of his

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12 It is unclear whether the mother had waived her right to counsel, whether she had never averred to being indigent or sought counsel, or whether she simply failed to raise the issue on appeal.

13 The mother had apparently consented to dependency jurisdiction, but she did not attend.

intention to appear before the court on the matter. Under these circumstances, it is clear that Maria did not waive her right to counsel, or, more fundamentally, her right to a meaningful opportunity to be heard, at the selection and implementation hearing.

In *Malcolm D., supra*, 42 Cal.App.4th at page 904, the court terminated a mother's parental rights after granting her attorney's motion to withdraw from the case on the ground that the attorney had been unable to contact the mother. Although it is unclear from the recitation of facts in the opinion, it appears that the section 366.26 hearing began in December 1994 and concluded in March 1995. (*Malcolm D., supra,* 42 Cal.App.4th at p. 909.) The mother appeared on the December 13 hearing date, and at that time the court reappointed the public defender's office to represent her. The hearing was continued to December 20, and the mother appeared on that date as well. At that hearing, she requested that the court consider placing Malcolm with her mother and making foster care the permanent plan. (*Id*. at p. 911.) The court continued the hearing again to give DSS an opportunity to reassess the proposed adoption plan. (*Ibid*.)

On the next hearing date, the mother's attorney appeared on the mother's behalf and asked that the court either grant a continuance or relieve her as counsel, because she had been unable to locate her client. The trial court did not continue the hearing, but instead granted the attorney's request to be relieved. (*Malcolm D., supra*, 42 Cal.App.4th at p. 914.) The court then proceeded with the section 366.26 hearing and terminated the mother's parental rights. (*Malcolm D., supra*, 42 Cal.App.4th at p. 914.)

The appellate court concluded that the trial court's actions amounted to a violation of the mother's *statutory* right to counsel, and further determined that under a *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of harmless error, she had suffered no prejudice as a result of the trial court's actions.[14] (*Malcolm D., supra*, 42 Cal.App.4th at p. 913.) The *Malcolm D.* court focused its analysis on the fact that the trial court had granted the attorney's motion to withdraw and concluded that the motion had been improperly granted because an inability to contact the client did not constitute sufficient cause for withdrawal. (*Id*. at pp. 918-919.) The appellate court went on to conclude that neither a continuance nor substitution of counsel would have had any effect because, the court presumed, any new counsel would also have been unable to contact the client. (*Ibid.*) In contrast, Maria's attorney had not requested to be relieved and, in fact, indicated his intention to represent her at the section 366.26 hearing. Nor did Maria impliedly waive her right to representation through her failure to contact her attorney or through other "obstreperous" conduct.[15] (Dis. opn., *post*, at pp. 11-12.) Unlike the

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14 The court appears to have followed the decision in *In re Ronald R.* (1995) 37 Cal.App.4th 1186, in which an appellate court applied the *Watson* standard to the erroneous granting of an attorney's motion to be relieved. (*Malcolm D., supra*, 42 Cal.App.4th at p. 919.)

15 The dissent asserts that under our holding in this case, "by simply failing to appear, or to have counsel appear, an obstreperous party can unilaterally halt the planning and permanency stage of the dependency proceedings." (Dis. opn., *post*, pp. 11-12.) However, courts have a number of options, short of halting the proceedings, to deal with the situation of an attorney who fails to appear. With respect to a parent who attempts to obstruct the proceedings by failing to maintain contact with the attorney or otherwise, such conduct may constitute an implied waiver of the right to be represented or heard.

mother in *Malcolm D.*, Maria neither expressly nor impliedly waived her right to have counsel assist her in contesting DSS's proposed permanency plan and, specifically, to represent her at the selection and implementation hearing.

Concluding that the presence of counsel at the hearing would not have made any difference in the outcome, the *Malcolm D.* court determined that the proceedings were not fundamentally unfair, and thus that the mother had no due process right to counsel. (*Malcolm D.*, *supra*, 42 Cal.App.4th at p. 921.) In our view, this reasoning is circular, and cannot be used to justify the termination of a fundamental right.

According to the *Malcolm D.* court, in order to establish that a constitutional right to counsel exists, "it is the parent's burden on appeal to demonstrate that *not only* did the absence of counsel make a determinative difference, it also rendered the proceedings fundamentally unfair." (*Malcolm D.*, *supra*, 42 Cal.App.4th at p. 921, italics added.) Under this reasoning, it is only when a parent has been prejudiced and can show that the proceeding was fundamentally unfair that the court will conclude that the error was of constitutional dimension. The flaw in this analysis is that it combines the determination of whether a particular error violated a constitutional right with the secondary determination whether such error must be reversed.

In analyzing whether a particular error is structural or not, the question whether a proceeding was fundamentally unfair is a completely independent inquiry from any issue of the strength of the evidence or the eventual outcome of the case. Obviously errors that lead to an erroneous result (i.e., errors leading to prejudice) are inherently unfair. However, there are some errors that go to the fundamental fairness of the underlying

process and which, by their very nature, undermine the safeguards otherwise presumed to exist in our judicial system. When such an error occurs, reversal is required regardless of the outcome, because we cannot say that the *proceeding* itself was fair. To the extent *Malcolm D.*, *supra*, 42 Cal.App.4th at page 921, may be read to hold that a court's action in terminating parental rights in the absence of the parent or the parent's counsel, where the parent is represented by counsel and has not expressly or impliedly waived the right to representation at the termination hearing, should be reviewed under a harmless error standard, we disagree.

In our view, the paucity of cases in which a trial court has terminated parental rights when neither the parent nor her attorney is present and the parent has not waived her right to be represented by counsel or to be heard, either expressly or impliedly, indicates just how fundamentally *unfair* the court's action was in this case. While we understand that courts may be frustrated with attorney conduct and/or the circumstances and delays that complicate court's calendars and slow judicial processes, there are other ways to deter such conduct that do not place fundamental individual rights at risk. If the court in this case was concerned about delay or frustrated with counsel's handling of the matter, the court could have appointed a different attorney for Maria, issued an order to show cause as to Attorney Roche's absence and imposed sanctions, or otherwise expressed displeasure with the attorney's failure to attend the hearing. Indeed, a court may utilize these or a number of other methods to deal with a theoretical "obstreperous party" the dissent claims will possess "unilateral control over the permanency stage of

dependency proceedings."[16] What the court may not do is run roughshod over the parties' fundamental rights to notice and a meaningful opportunity to be heard, by proceeding to terminate parental rights when neither the parent nor her attorney are present, where the parent has not waived the right to be represented by counsel or the right to be heard.

When courts, through their actions, fail to provide a process that adequately protects individual rights, particularly rights as fundamental as the right to parent a child, the legitimacy of the judicial system is called into question. We therefore conclude that where a parent is represented by counsel, either appointed or retained, it is error to terminate parental rights in the absence of the parent's attorney unless the parent has waived, either expressly or impliedly, the right to be represented by counsel and the right to be heard.

The court's error in this case, like the failure to attempt to notify the parent of the hearing in *Jasmine*, denied Maria the opportunity to present her case. The error was "not merely a mistake that hinders a party's ability to present a case effectively," but rather, constituted "a flaw in the systematic framework that denie[d] that party the opportunity to

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16 Additionally, it is not the case that a party who "abandon[s] further challenge" after a disposition hearing will be able to "unilaterally halt the planning and permanency stage of the proceedings" by simply "failing to appear," as the dissent suggests. (Dis. opn., *post*, pp. 11-12.) If such an instance were to occur, this behavior most likely would constitute an implied waiver of the right to counsel *and* of the right to be heard. There was no such waiver here. Maria reasonably expected that her counsel would be present to represent her at the section 366.26 hearing.

be heard at all." (*Jasmine G., supra,* 127 Cal.App.4th at p. 1116.) For this reason, the court's order terminating Maria's parental rights must be reversed.

IV.

CONCLUSION

By terminating Maria's parental rights at a hearing at which neither she nor her attorney were present and where she had not waived her right to be represented by counsel or her right to be heard, either expressly or impliedly, the court deprived Maria of the right to counsel and of any meaningful opportunity to be heard. The error is of such magnitude that it is structural and requires automatic reversal.

V.

DISPOSITION

The trial court's order and subsequent judgment terminating Maria's parental rights is reversed and the case is remanded to the juvenile court. On remand, the court shall conduct a new section 366.26 hearing and shall allow Maria's attorney to present Maria's position with regard to the termination of her parental rights. The court shall then redetermine the issue of Maria's parental rights, based on the evidence presented at the new hearing.

In light of the disposition on her direct appeal, Maria's petition for a writ of habeas corpus is moot and is therefore denied.

CERTIFIED FOR PUBLICATION

AARON, J.

I CONCUR:

NARES, J.

BENKE, J., dissenting.

My colleagues, relying on *Arizona v. Fulminante* (1991) 499 U.S. 279 [111 S.Ct. 1246] (*Fulminante)*, and case authority involving lack of notice to litigants, conclude that proceeding in the absence of counsel at a selection and implementation hearing under Welfare and Institutions Code section 366.26 amounts to a structural defect requiring per se reversal. I disagree. The selection and implementation hearing does not present a situation where the parents' interests are at their strongest, the state's interests at their weakest and the risk of error is at its peak. Indeed, at the section 366.26 hearing the right to parent is perhaps at its lowest point in the dependency process, the state's interests now joined with the child's is at its peak and the risk of error is low. The Constitution therefore requires counsel's presence only if the record in a given case supports the conclusion that, in the absence of counsel, there would be an unacceptable risk of error. Here there was no such risk.

I

In the context of dependency proceedings involving termination of parental rights, *Lassiter v. Department of Soc. Serv. of Durham Cty.* (1981) 452 U.S. 18 [101 S.Ct. 2153] (*Lassister*) sets forth a three-prong criteria for determining whether in a given case the parents' interests "were at their strongest, the State's interest were at their weakest, and the risks of error were at their peak," such that the presumption against appointment of counsel is overcome. (*Id.* at p. 31.) The decision whether due process calls for

appointment of counsel in termination proceedings is to be answered in the first instance by the trial court subject to appellate review of the facts and record of each case. (*Id*. at p. 32.) The burden is on the parent complaining of constitutional defect to demonstrate based on the record that there was a "determinative difference" in the outcome of the proceeding by reason of the lack of counsel, such that the proceeding was rendered fundamentally unfair to the parent. (*Id.* at pp. 32-33.)

California dependency cases treating claims of denial of due process because of the absence of counsel follow *Lassiter's* case by case approach. These opinions also agree that where counsel is absent, a parent has the burden of demonstrating there would have been a "determinative" difference at the hearing had counsel been present. (*In re Malcolm D*. (1996) 42 Cal.App.4th 904, 921; *In re Ronald R*. (1995) 37 Cal.App.4th 1186, 1195-1197; see also *In re Justin L.* (1987) 188 Cal.App.3d 1068, 1073, citing *Lassiter* and using a *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 837) harmless error analysis.)

Claims of constitutional defect at dependency hearings due to the closely related issue of ineffective assistance of counsel are also determined on a case by case basis. (*In re Emilye A*. (1992) 9 Cal.App.4th 1695, 1708, citing *Lassiter; In re Arturo A.* (1992) 8 Cal.App.4th 229, 238; *In re Christina P*. (1985) 175 Cal.App.3d 115, 128-129, citing *Lassiter.*) These, and other opinions, have all concluded that before relief will be granted, the complaining party must show some form of prejudice, for example that a prima facie case of prejudice is shown, or that there is a reasonable probability, sufficient to undermine confidence in the outcome, that but for counsel's unprofessional errors the

result of the proceeding would have been different. (See *In re Emilye A. supra,* 9 Cal.App.4th at pp. 1708, 1711; *In re Eileen A.* (2000) 84 Cal.App.4th 1248; 1259-1260, *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1668-1672; *In re Arturo A.*, *supra,* 8 Cal.App.4th at p. 245; *In re Meranda P*. (1997) 56 Cal.App.4th 1143, 1153; *In re Christina P., supra,* 175 Cal.App.3d at pp. 129-130.)

While they cite *Lassiter,* my colleagues do not examine the record of this case, and therefore do not answer the question whether there has been a showing that counsel's presence at the section 366.26 hearing would have made a determinative difference. Instead, they conclude that because counsel was not present at the section 366.26 hearing, there is no record in this case and therefore the per se reversible error standard applies, rather than *Lassiter*'s "determinative difference" standard. In doing so, the majority agrees with mother that her failure and her counsel's failure to appear and present their case -- their failure to create the very record they now claim is lacking -- should form the basis for reversal. With all due respect not only is there is no authority for this novel approach, there is also a full record in this case.

A

Applying *Lassiter* to the selection and implementation hearing first requires an examination of the parental interest involved. In doing so, it is clear a parent's rights at the section 366.26 hearing are significantly diminished compared to the fundamental parental rights at stake during the dispositional process. Contrary to mother's assertions here and acceptance of that assertion by my colleagues, the "fundamental right to parent" is no longer at stake once dependency proceedings reach the permanency planning stage.

(*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253-256 (*Cynthia D.*); also see *In re Jasmon O.* (1994) 8 Cal.4th 398, 420.) Nor as my colleagues urge, are the best interests of the child at issue. (Majority opn., pp. 15-16; § 366.26, subd. (c)(4); *In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164-1165; *In re Jasmine J.* (1996) 46 Cal.App.4th 1802, 1807-1808.)

The nature of the selection and implementation hearing and the interests of the parties at that hearing have been thoroughly explained by our Supreme Court in *Cynthia D., supra,* 5 Cal.4th 242. As *Cynthia D*. explains: "[I]n order to terminate parental rights [at a section 366.26 hearing], the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated." (*Id*. at pp. 249-250.) " *'[T]he critical decision regarding parental rights will be made at the dispositional or review hearing, that is, that the minor cannot be returned home and that reunification efforts should not be pursued. In such cases, the decision to terminate parental rights will be relatively automatic if the minor is going to be adopted.'* [Citation.] . . . . *Therefore, the decisions made at the review hearing regarding reunification are not subject to relitigation at the termination hearing. This hearing determines only the type of permanent home.'* [Citation.]" (*Id*. at p. 250, italics added.)

Thus at the section 366.26 hearing the sole issue before the court is the adoptability of the minor. (*In re Malcolm D. supra*, 42 Cal.App.4th at p. 921.) The court has no discretion to consider as a dispositional matter the return of the child to a parent. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 304-305.) "A parent whose conduct has already

and on numerous occasions been found to grievously endanger his or her child is no longer in the same position as a parent whose neglect or abuse has not so clearly been established. *At this point the interests of the parent and child have diverged, and the child's interest must be given more weight.* Because section 366.26 contemplates termination of parental rights only when there is clear and convincing evidence that the child is likely to be adopted, the child's fundamental interest in the opportunity to experience a stable parent-child relationship is very much at stake at the 366.26 hearing." (*Cynthia D., supra*, 5 Cal.4th at p. 254, italics added.) "By the time termination is possible under our dependency statutes the danger to the child from parental unfitness is so well established that there is no longer 'reason to believe that positive, nurturing parent-child relationships exist' [citation] and the *parens patriae* interest of the state favoring preservation rather than severance of natural familial bonds has been extinguished. . . . [I]t has become clear 'that the natural parent cannot or will not provide a normal home for the child' [citation], and the state's interest in finding the child a permanent alternate home is fully realized." (*Id.* at p. 256.)

It is significant that mother did not appeal from the critical point in the dependency proceedings when her reunification rights were terminated. Thus, we must assume that going into the section 366.26 process she understood that her reunification services had come to an end and the court would not, because it could not, return Michelle to her. (*In re Meranda P.*, *supra*, 56 Cal.App.4th at pp. 1156-1157.)

Likewise, mother's interest in the section 366.26 hearing is demonstrated by her failure to appear personally at the hearing. On the day set for the section 366.26 hearing,

she contacted the social worker who arranged transportation for her and informed the social worker that she could not be present because something occurred over the weekend. What exactly occurred and how it was related to her failing to appear is not explained in the record, but whatever it was, it was clearly more important to her than the hearing at which the adoptability of her child was to be decided. As for mother's counsel, he had his secretary call the court to inform it that he was in trial in a small claims matter. He did not ask for a continuance. Apparently he did not give an estimate of time as to how long he would be held up in trial. He did not ask minor's counsel to specially appear for him as he had several times in the past. According to his affidavit attached as Exhibit A to the writ of habeas corpus filed in this case, he "assumed" this significant hearing in the dependency court would simply trail until he appeared.

Finally, although the court was without jurisdiction to set aside, modify or change its order of adoptability and termination at the section 366.26 hearing (Welf. & Inst. Code, § 366.26, subd. (i); *In re Jerred H.* (2004) 121 Cal.App.4th 793, 796-798), a parent may ask the court for equitable relief if there was extrinsic fraud and a meritorious defense. (*In re David H.* (1995) 33 Cal.App.4th 368, 380-385.) Mother did not take any action to inform the court that somehow she was misled into believing she would be represented at the hearing and then discovered she was not.

Based on the record, I am led to the conclusion that the section 366.26 hearing was not of significant interest to either mother or her counsel.

B

In comparison, the government's interest at the section 366.26 hearing is, and in this case was, very high compared to that of Michelle's mother. At the permanency planning hearing, the interest of the government becomes joined with the fundamental interest the child now has in obtaining a permanent stable home. (*Cynthia D, supra*, 5 Cal.4th at p. 256.) In Michelle's case the need for a permanent and stable placement is critical. Michelle, who was originally diagnosed with failure to thrive, is a medically fragile child. She was born with serious medical problems due to her premature birth and her prenatal exposure to methamphetamine and opiates taken by her mother. Although by the time of the section 366.26 hearing she had improved a great deal, she still needed weekly physical and occupational therapy, and she had a G-tube in place due to gastrointestinal reflux. She also suffered from chronic lung disease that required occasional assistance with breathing. Shortly before the section 366.26 hearing she was determined to be of low-average mental development and mildly-delayed motor development. There is some concern that she suffers from cerebral palsy. Since shortly after her birth, at two months of age, Michelle has been placed in foster care with a family that loves her and desires to adopt her. The family cares for several disabled children.[1]

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1 Counsel for Michelle appears to argue that a disabled child is not *generally* adoptable and therefore must be subjected to a higher standard of adoptability. This proposition is supported by no authority. The majority, however, appears to have settled

C

Finally, the risk of any error in terminating parental rights at the section 366.26 hearing is low in large part because return of the child to the parent is not an option. (*In re Marilyn H., supra,* 5 Cal.4th at pp. 304-305.) The ability of a parent to appeal the dispositional decision that set the matter for a permanency planning hearing under section 366.26 has been made available. Counsel has been made available. While a parent may present evidence of changed circumstances at the section 366.26 hearing, they may do so only as evidence of the statutory exception that the child would benefit from a continued parent-child relationship. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575-576.)

Focusing on the adoptability issue, mother asserts that proceeding without her and her counsel created a risk of error because she was not present to argue statutory exceptions to adoptability. She urges that had the court waited for counsel, he might have been able to present an argument showing mother and Michelle had a beneficial relationship or that there was a sibling exception due to the relationship between Michelle and her brother Anthony who occasionally accompanied his mother to visits. The record, however, including the writ of habeas corpus, is devoid of any evidence such exceptions might apply.

There is no evidence that severing the natural relationship between Michelle and her mother would deprive Michelle of a substantial positive emotional attachment such

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on this reasoning (majority opn., p. 3, fn. 2), thus forming a basis for its conclusion that

that Michelle would be greatly harmed. (*In re Autumn H. supra,* 27 Cal.App.4th at p. 575.) As of May 6, 2004, when Michelle was 18 months old, mother had visited with her approximately 17 times. The record reflects mother visited Michelle once a month, had no bonding with the child and Michelle felt no separation from her when the visits ended.

Nor is there evidence of a sibling exception anywhere in this record. Establishing this exception creates a heavy burden on the parent seeking to establish its existence. (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) There must be a compelling reason to conclude the termination of parental rights would be detrimental to the child because of a sibling relationship. (*Ibid.;* see also *In re Celine R.* (2003) 31 Cal.4th 45, 61.) At the time of the section 366.26 hearing Anthony was three years old and Michelle was two years old. She did not relate to Anthony during visits.

Against this backdrop it is worth noting that the selection and implementation hearing under section 366.26 was continued a number of times. It was originally set for May 10, 2004. On that date mother's counsel requested a continuance to obtain some tests. The matter was continued until June 7, 2004. On that date the county requested a continuance to serve the father and the matter was continued until August 9. A Title 4(e) hearing was set for June 21 but mother's counsel was not present. Through a special appearance by Michelle's counsel, he requested an additional week continuance because he was in trial. The Title 4(e) hearing was continued until June 28. On June 28 counsel for mother appeared and said he had received the May 10 report that day. No objection

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the proceedings were unfair. Michelle is adoptable.

was raised to the content of the report by either counsel for minor, mother's attorney or father. The section 366 366.26 hearing was confirmed for August 9. Mother and her counsel absented themselves from that hearing. If this matter is remanded, additional time will have passed before Michelle receives some stability and obtains a determination of her placement. By that time, Michelle, who has never lived with her mother and has no bond with her, might well be over three years old.

II

My colleagues conclude that in abandoning the *Lassiter* analysis, they are joining other California cases using the *Fulminante* per se reversal standard. (Majority opn., p. 18.) However, the cases cited by my colleagues, *Judith P v. Superior Court* (2002) 102 Cal.App.4th 535 and *In re Jasmine G*. (2005)127 Cal.App.4th 1109, deal with failure to give notice, not presence of or competency of counsel. In both cases the courts noted that failure to give proper notice to parties at contested disposition hearings or six-month review hearings result in structural error requiring reversal without regard to prejudice. The disposition stage at which reunification services may be terminated is the critical stage in dependency proceedings. (*Cynthia D., supra*, 5 Cal.4th at p. 250.) The parents at the disposition stage run a very high risk of losing the right to parent if through no fault of their own they are not present and their reunification services are terminated. (Cf. *In re Daniel S*. (2004) 115 Cal.App.4th 903 [attempt made to notify mother but not temporary conservator where mother was placed in a mental hospital is trial error not structural error].) Given the risk of error and the high parental interest at stake, the government's interest at such hearings must be subservient to the interests of the parent to

be present and to be heard. (*In re Jasmine G., supra,* 127 Cal.App.4th at p. 1115; *Judith P*. v. *Superior Court, supra,* 102 Cal.App.4th at pp. 553-558; also see *In re Stacy T.* (1997) 52 Cal.App.4th 1415.) These cases, however, are not controlling authority here since this case involves the selection and implementation stage, and the existence and adequacy of notice are not at issue. While mother and my colleagues mix the notice and presence of counsel issues in their analyses, both mother and her attorney were clearly aware of the date and time of the section 366.26 hearing and voluntarily absented themselves. The sole question here is the effect of their failing to appear at the section 366.26 hearing. I have found no case, and the majority cites no case, where the voluntary absence of counsel or presence of competent counsel at the section 366.26 hearing requires per se reversal. (See *In re Meranda P., supra,* 56 Cal.App.4th at pp. 1157-1158, fn. 9.)

Additional reasons support rejection of the per se standard of reversibility where counsel fails to appear at the section 366.26 hearing. It would be anomalous to hold that if counsel is not present, the case is subject to per se reversal, but if counsel is present and wholly ineffective, the standard is harmless error and the case will not be reversed unless it can be demonstrated that prejudice resulted. Counsel who is unprepared would best not appear at all.

The per se reversible error standard also paints with too broad a brush at the permanency planning hearing. In *Rushen v. Spain* (1983) 464 U.S. 114, 117 [104 S.Ct. 453], the court explained that the right to be present during all critical stages of the proceedings and the right to be represented by counsel, "as with most constitutional

rights, are subject to harmless-error analysis unless [citation] the deprivation, *by its very nature*, cannot be harmless." (*Id.* at p. 117, fn.. 2, italics added.) The failure of a properly noticed parent and attorney to appear at a section 366.26 hearing can certainly be harmless. It is conceivable that once the disposition stage has passed in a hotly contested disposition hearing, a parent may conclude there are no grounds on which to appeal that decision and abandon further challenge. Then, by simply failing to appear, or to have counsel appear, an obstreperous party can unilaterally halt the planning and permanency stage of the dependency proceedings.

The danger in implementing such a broad application of the structural error rule, and thereby sweeping into automatic reversal those cases that should not be reversed, is discussed in *People v. Noel* (May 5, 2005) D.A.R. 5112, 5147. " 'Correctly applied, harmless error and structural error analyses produce identical results: unfair convictions are reversed while fair convictions are affirmed. Expanding the list of structural errors, however, is not mere legal abstraction. It can also be a dangerous endeavor. There is always the risk that a sometimes harmless error will be classified as structural, thus resulting in the reversal of criminal convictions obtained pursuant to a fair trial. Given this risk, judges should be wary of prescribing new errors requiring automatic reversal. Indeed, before a court adds a new error to the list of structural errors (and thereby the error occurs), the court must be certain that the error's presence would render *every* such trial unfair.' [Citation.]"

III

In summary, I would find it is not structural error to proceed at the section 366.26 hearing in the absence of counsel and parent and therefore the *per se* reversible error standard of *Fulminante* does not apply. Rather, I would apply the *Lassiter* case by case analysis. Balancing the private interest of mother, the interests of the state and Michelle, and the risks of error in determining adoptability at the section 366.26 hearing, I would conclude the federal right to counsel was not infringed in this case. Since mother has failed to sustain her burden to demonstrate the presence of counsel would have made a determinative difference in the outcome, I would affirm the judgment.[2]

CERTIFIED FOR PUBLICATION

BENKE, Acting P. J.

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[2] Mother does not raise the question of whether her statutory right to competent appointed counsel was violated. The majority opinion does not address the issue. Even if the court violated mother's statutory right to counsel by proceeding in his absence, the standard of review is harmless error. (See generally Welf. & Inst. Code, § 317.5, subd. (a); *In re Meranda P., supra*, 56 Cal.App.4th at p. 1153; *In re Malcolm D., supra*, 42 Cal.App.4th at pp. 914-915.) For the reasons noted, I would find mother has failed to demonstrate she has been prejudiced or that the result would have been any different had counsel appeared.